United States Court of Appeals

for the Second Circuit

APPENDIX

74-2167

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

THERESE ROBERGE,
On behalf of herself,
her minor children and
all persons similarly
situated,
Plaintiff-Appellants

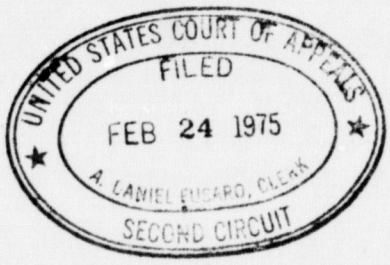
vs.

PAUL PHILBROOK,
Commissioner of
Social Welfare,
Defendant-Appellee

On Appeal from the United States District Court

for the District of Vermont

JOINT APPENDIX



JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
150 Cherry Street
P.O. Box 562
Burlington, Vermont 05401

Counsel for Plaintiff-
Appellants

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PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET

TATES DISTRICT COURT

No. 6301

Jury demand date:

COFFRIN

Rev.

TITLE OF CASE	ATTORNEYS
HERESE ROBERGE, on behalf f herself, her minor children nd all persons similarly ituated vs. OSEPH W. BETIT, Commissioner f Social Welfare	For plaintiff: John A. Dooley, III, Esq. Vermont Legal Aid, Inc. Burlington, Vermont For defendant: Hon. James M. Jeffords, Attorney Gen. Pavilion Office Bldg., Montpelier, Vt Benson D. Scotch, Esq. Assistant Attorney General Department of Social Welfare Montpelier, Vermont 05602 David L. Kalib, Ass't. Atty. Gen. Office of the Attorney General Montpelier, Vt. 828-3445 for Deft. Philbrook

ISTICAL RECORD	COSTS		DATE 1971	NAME OR RECEIPT NO.	REC.	DISB.
d JUL 6 1971	Clerk		6-9	#18300	15 00	
			6-11	C. D. #58		15 00
					15 00	15 00
d AUG 5 1974	Marshal		1974			
			9-11	#23130	5 00	
tion: Social rity Act	Docket fee	0	" 13	CD#12		5 00
	Witness fees					
e at: 2	Depositions					

A-1

PROCEEDINGS	Date Orde Judgment N
Filed Complaint; Application for a Three Judge Court.	1.
Issued Summons and delivered same to Marshal for service.	
Filed Summons returned served.	2.
Filed Defendant's Answer.	3.
" Stipulation.	4.
" Defendant's Waiver to Submit Brief.	5.
" Stipulation (amended).	6.
" Order joining class of Plaintiffs; that all members of said class shall be notified by notice not later than Nov. 16, 1971, and that appearances by members of class shall be entered on or before Dec. 1, 1971. Mailed copy to attorneys.	7.
Filed 41 Class Action forms from Chittenden County.	8.
" Class Action forms from Vermont excluding Chittenden County.	9.
" Plaintiff's Request to Produce.	10
" Plaintiff's Interrogatories to Defendant.	11
" Plaintiff's Request to Admit.	12
" Stipulation for hearing before single Judge.	13
" Letter of Plaintiff re class action notice.	14
" 8 Class Action forms from Chittenden County received after December 1, 1971.	15
" 8 Class Action forms from Vermont excluding Chittenden County received after December 1, 1971.	16
" Plaintiff's Motion to Compel and Certificate of Service.	17
" Defendant's Answers to Interrogatories and Affidavit.	18
" Defendant's Response to Request to Produce.	19
" Plaintiff's Motion for Summary Judgment and Certificate of Service.	20
Filed Affidavit.	21.
" Defendant's Memorandum of Law in opposition to Motion for Summary Judgment, and Certificate of Service.	22
In open Court before Judge Oakes. John A. Dooley, III, Esq., for Plaintiff. Benson D. Scotch, Esq., for Defendant.	
Hearing on Plaintiff's Motion for Summary Judgment and on Plaintiff's Motion to Compel.	
Court makes inquiries of Mr. Dooley and Mr. Scotch.	
Statements made to Court by Mr. Dooley followed by Mr. Scotch.	
ORDERED: Mr. Dooley to submit Briefs by the end of this week and that Defendant is to have one week in which to reply.	
ORDERED: Decision reserved on Plaintiff's Motion for Summary Judgment and on Plaintiff's Motion to Compel.	
Filed Plaintiff's Memorandum of Law and Certificate of Service.	23
" Defendant's request for extension of time in which to file reply brief. (to May 15, 1972)	24
Upon consideration of defendant's request for extension of time to May 15, 1972 in which to file reply brief, it is	
ORDERED: Granted. Attorneys notified.	
Filed Affidavit of Bert N. Smith.	25.
" Affidavit of Vasili L. Bellini.	26.
" Affidavit of Edward Pirie.	27.
" State's Reply Memorandum of Law in opposition to Motion for Summary Judgment.	28.
Filed Plaintiffs' Motion to Strike, Opposition to Defendant's Motion for Summary Judgment and Motion for Continuance, Certificate of Service and Affidavit.	29.

Civ. 6301

Therese Roberge etc. vs. Joseph W. Betit etc.

v. Civil Docket Continuation

	PROCEEDINGS	Date Order Judgment N
	Filed Motion to file Plaintiff's Memorandum of Law Out of Time.	30.
	" Defendant's Memorandum in Opposition to Motion to Strike.	31.
	" Plaintiff's Memorandum of Law and Certificate of Service.	32.
	" Stipulation that plaintiff's memorandum of law may be filed out of time.	33.
	Upon consideration of Stipulation that plaintiff's memorandum of law may be filed out of time, it is	
	So Ordered. Attorneys notified.	
	Filed Opinion and Order -- Plff's motion to strike all of deft's affidavits submitted on 5/15/72 is denied; defendant's motion for leave to file out of time granted; plff's motion to strike affidavit of Edward Pirie submitted by defendant on 5/16/72 is denied; plff's motion to deny or continue defendant's motion for summary judgment is denied; cross-motions for summary judgment; (1) area differentials in rental maximums, plff's denied; deft's granted; (2) elimination of rental exceptions and allotments for fire insurance plff's denied. Deft. given opportunity to prove contentions. Copy mailed to attys.	34.
19	In open Court before Judge Coffrin, hearing on issues designated by Judge Oakes' order of October 14, 1972. John A. Dooley III, Esq. and Stephen Kimball, Esq. for Plaintiffs; David Kalib, Esq. and Dean B. Pineles, Esq. for Defendant.	
	Statements made to Court by Mr. Dooley who states that this hearing is with respect to Plaintiffs' motion for summary judgment and on defendant's contention that fire insurance payments were not eliminated.	
	Mr. Dooley states that Defendant Joseph W. Betit is no longer Commissioner of Social Welfare and was replaced by Paul Philbrook.	
	Parties stipulate to certain documents filed in case(Paper Nos. 12, 18 & 19)	
	Filed deposition of Burt N. Smith.	35.
	" " " Edward Piere.	36.
	" " " Vasili Bellini.	37.
	The following witnesses, sworn by Clerk, were examined for Plaintiffs: Therese Roberge, Vasili Bellini, Perry J. Kinsley, Jr. and Edward C. Pirie.	
	At 4:25 PM, Plaintiffs rests.	
	Bert N. Smith, sworn by Clerk, was examined for defendant.	
	At 5:30 PM, Defendant rests. Plaintiffs rests. Evidence closed. Decision reserved. Parties to prepare joint proposed findings and submit briefs within 30 days.	
	Filed deposition of Perry J. Kinsley, Jr.	38.
12	At the Call of the Calendar before Judge Coffrin, it was	
"	ORDERED: That this case be passed.	
	Filed Order--the parties shall comply with the Court's order of September 19, 1973 within 10 days from the date hereof or the above entitled action will be dismissed. Mailed copy to Attys.	39.
3	Filed Joint Proposal for Findings of Fact.	40.
	Filed Deft.'s Memorandum of Law.	41.
	Filed Plaintiff's Memorandum of Law in Objection	42.

over--

PROCEEDINGS	Date Order or Judgment Note
Filed Findings of Fact, Opinion and Conclusions of Law -- within 30 days from the date of this opinion, defendant is directed to submit a plan to this Court whereby fire insurance payments may be made in a manner consistent with Section 402(a)(23). A copy of said plan shall be submitted to plaintiff, who shall have 15 days from receipt thereof to present to the Court any objections which she may have thereto. Copy mailed to attys.	43.
" Notice of Appearance of David L. Kalib, Ass't. Atty. Gen., for Deft. Philbrook.	44.
Filed Defendant's letter dated June 6, 1974.	45.
" Plaintiff's letter dated June 10, 1974.	46.
" Order of Judgment -- defendant within 30 days shall restore fire insurance costs as an independent need item within the aid to needy families with Children Program and shall pay to each recipient family amount of fire insurance costs-- defendant enjoined from modifying or implementing any proposal re fire insurance costs different than those set forth above unless submitted to Court 30 days prior to its effective date and granted by Court. Mailed copy to attys.	47.
" Pltfs' Notice of Appeal. Mailed copy to John A. Dooley, III, Esq., Attorney General, David L. Kalib & Benson D. Scotch, Ass't. Atty. Gen., Judge Coffrin, Court Reporter and Clerk, Court of Appeals for the Second Circuit. Mailed Forms C&D to Pltf	48.
" Deft's. Notice of Appeal. Mailed copy to John A. Dooley, III, Esq., Attorney General, (Benson D. Scotch, Esq., Ass't. Atty. Gen.) (David L. Kalib, Ass't. Atty. Gen.), Judge Coffrin, Court Reporter and Clerk, U. S. Court of Appeals for the Second Circuit.	49.
" Deft's. Motion to Stay, including Supersedeas in District Ct.	50.
" Memorandum of Law in support of Deft's. SMotion to Stay enforcement of the Judgment.	51.
Mailed Plan & Forms C & D to Mr. Kalib, Esq.	
Filed Motion for Leave to Appeal in forma pauperis and Affidavit in support thereof.	52.
Filed Order allowing pltf. to proceed on appeal in forma pauperis. Mailed copy to attorneys and Mr. Fusaro.	53.
" Order -- Court's Judgment Order entered on 7-19-74 be temporarily stayed pending hearing on defendant's Motion for stay of judgment pending appeal. Mailed copy to attorneys.	54.
Filed Order extending time to docket the Record on Appeal. Copy mailed to attys.	55.
Filed Plaintiffs' memorandum of law in opposition to a stay.	56.
Filed Affidavit of Paul R. Philbrook.	57.
In Chambers before Judge Coffrin, hearing on defendant's motion for stay of Judgment Order. John A. Dooley, III, Esq. for Plaintiffs; David L. Kalib, Esq. for Defendant. Ordered: Motion denied.	
Mailed Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, New York, N. Y. Attys. notified.	
Filed Authorization for expense of transcript.	58.
" Transcript of Hearing held 9-19-74.	59.
Mailed Supplemental Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, N.Y., N.Y. Attys. notified.	

FPI—LK—12-8-63—12M—2945

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, on behalf of herself, her minor children and all persons similarly situated, Plaintiffs	:	CIVIL ACTION NO. 6301
vs.	:	
JOSEPH W. BETIT, Commissioner of Social Welfare, Defendant	:	

COMPLAINT

I.

Statement

Plaintiff, on behalf of herself, her minor children, and all persons similarly situated seek, in this action, declaratory and injunctive relief against the enforcement against them, of regulations of the Vermont Department of Social Welfare providing for the establishment of housing payment maxima in Chittenden County on the ground that these regulations deny equal protection of the law and conflict with provisions of the Social Security Act and regulations promulgated pursuant thereto.

II.

Jurisdiction

Jurisdiction over this action is based upon 28 U.S.C. § 1343 providing for federal court jurisdiction where a violation of civil rights is claimed.

III.

Allegations - Representative Plaintiff

1. Plaintiff, Therese Roberge, is a citizen of the State of Vermont, residing with her minor children, in the City of Burlington;

2. Defendant, Joseph W. Betit, is the Commissioner of Social Welfare of the State of Vermont. Pursuant to 33 V.S.A. § 2505, defendant has the power to promulgate rules and regulations necessary to administer the laws assigned to the Department of Social Welfare. These regulations, as they pertain to this action, are found in the Family Services Policy Manual;

3. Plaintiff, Therese Roberge, is presently receiving welfare assistance on behalf of herself and her two minor children, under the Aid to Needy Families with Children program. Prior to November 1, 1970, plaintiff received two hundred and ninety seven dollars ($297) per month under this program. Plaintiff's monthly rent was one hundred and twenty-five dollars ($125) and her monthly grant included this amount. The remaining one hundred and seventy-two dollars ($172) per month was intended to cover basic needs -- food and clothing - telephone, and fire insurance.

4. Prior to November 1, 1970, the ANFC program provided payments for rent up to a maximum of one hundred and four dollars ($104) per month in Chittenden County and eighty-eight dollars ($88) per month in the remainder of the State. These maxima were set arbitrarily without regard to the actual

to the actual housing needs of recipients. In addition, "exceptions" to the rental maxima were given for some persons who had rental costs in excess of the maximum. Plaintiff, Therese Roberge, had such an exception for one hundred and twenty-five dollars ($125) per month.

5. On November 1, 1970, as part of a change in ANFC regulations, all housing exceptions were deleted, and a 100% ratable reduction was taken in payments for telephone and fire insurance. Plaintiff's grant was changed to reflect the decrease in housing allotment from one hundred and twenty-five dollars ($125) per month to one hundred and four dollars ($104) per month and the deletion of allotments for telephone and fire insurance. The allotment for telephone was subsequently restored to the plaintiff's grant pursuant to a Board of Social Welfare order of May 27, 1971.

6. On November 1, 1970, the median housing cost in Chittenden County for welfare recipients was one hundred dollars ($100) per month. The median housing cost in the remainder of the State at the same time was sixty-seven dollars ($67) per month.

7. On November 1, 1970, over ninety percent (90%) of all housing exceptions were held by Chittenden County residents. Over sixteen percent (16%) of the ANFC recipients in Chittenden County had housing exceptions on that date. Prior to November 1, 1970, housing exceptions were given as a matter of course to ANFC recipients if they requested such an exception, had housing costs above the maximum and had no other sources of income.

8. The present maximum on housing allowance in Chittenden County and the deletion of housing exceptions deny plaintiff equal protection of the law since, solely because she is a resident of Chittenden County, she receives a smaller percentage of her housing need than residents of other parts of the State of Vermont,

9. The maximum on housing allotments for ANFC recipients in Chittenden County is inconsistent with Section 402(a)(23) of the Social Security Act, as amended, 42 U.S.C. § 602(a)(23) since:

a) the "exceptions" were part of the housing maximum and could not be deleted or reduced consistent with the act,

b) the maximum was set without regard to the actual needs of recipients and does not reflect an accurate statement of these needs.

10. The maximum on housing allotments for ANFC recipients in Chittenden County and the elimination of housing exceptions violates the Social Security Act and regulations promulgated pursuant thereto since Chittenden County residents receive a lesser percentage of their housing needs than residents of other parts of the State;

11. The elimination of allotments for fire insurance violates Section 402(a)(23) of the Social Security Act and regulations promulgated pursuant thereto since:

a) such allotments were maxima that could not

be reduced consistent with the act,

b) the needs of ANFC recipients no longer reflect actual costs of living in violation of the act;

c) a portion of the ANFC recipients now receive a higher percentage of their needs than others.

IV.

Allegations - Class

12. Plaintiff represents a class of Aid to Needy Families with Children recipients in Chittenden County who have rental costs in excess of the maximum established by the Vermont Department of Social Welfare or have fire insurance costs or both;

13. All of the prerequisites to a class action set out in Rule 23 of the Federal Rules of Civil Procedure are met since:

a) the number of persons in the class is believed to be in excess of four hundred (400),

b) the questions of law and fact are identical for all members of the class, including the representative plaintiffs,

c) the representative plaintiffs will fairly represent the class, and

d) the defendant, his agents and servants have acted on grounds applicable to all members of the class.

V.

Prayer for Relief

14. WHEREFORE, plaintiffs respectfully pray that:

a) This Court declare that regulations of the Vermont Department of Social Welfare insofar as they provide for the payment of a lesser percentage of housing needs in Chittenden County as opposed to the remainder of the State of Vermont and abolish housing exceptions in Chittenden County be declared unlawful and invalid since they deprive plaintiffs of equal protection of the law and conflict with provisions of the Social Security Act and regulations promulgated pursuant thereto;

b) This Court declare that regulations of the Vermont Department of Social Welfare insofar as they provide for the abolition of the cost of fire insurance from the needs and payments of AFDC recipients are in conflict with provisions of the Social Security Act and regulations promulgated pursuant thereto;

c) This Court preliminarily and permanently enjoin the enforcement of the aforementioned regulations against plaintiffs;

d) This Court order that the defendant, his agents and servants pay to plaintiffs the welfare benefits they have been deprived of by virtue of the aforementioned regulations;

e) This Court issue any further relief that it deems necessary and appropriate.

VI.

Application for a Three Judge Court

Plaintiffs request that this action be heard and decided by a three judge district court pursuant to 28 U.S.C. § 2281 since plaintiffs seek a preliminary and permanent injunction against the enforcement of state regulations on the ground that those regulations are unconstitutional.

DATED at Burlington, Vermont, this 9th day of June, 1971.

/s/ John A. Dooley, III
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

THERESE ROBERGE, on behalf of herself, her minor children and all persons similarly situated, Plaintiffs	:	CIVIL ACTION FILE NO. 6301
vs.	:	
JOSEPH W. BETIT, Commissioner of Social Welfare, Defendants	:	

ANSWER

FIRST DEFENSE

1. Complaint fails to state a claim against the defendant over which the District Court has jurisdiction, because no rights, privileges or immunities, within the meaning of 28 U.S.C., Section 1343, are involved in this action and no civil action in excess of $10,000 arising under the Constitution, laws or treaties of the United States is stated in the Complaint.

2. Complaint fails to state a claim against the defendant over which the District Court has jurisdiction, because plaintiff has failed to exhaust her State administrative remedies.

3. The Complaint fails to state a claim against the defendant over which the District Court has jurisdiction, because the plaintiff has failed to exhaust her State judicial remedies pursuant to Act 98 of the Public Acts of 1971.

SECOND DEFENSE

1. Complaint fails to state a claim against the defendant upon which relief can be granted.

THIRD DEFENSE

1. Defendant admits the allegations contained in paragraphs III-1, III-2, III-4, except that part of paragraph 4 which alleges that maximum benefits were set arbitrarily and without regard to the actual housing needs of the recipient, which part is denied; III-3 and III-5, except those parts of the paragraphs which refer: (1) to fire insurance as a basic need item; (2) to ratable reductions of fire insurance and (3) to deletion of allotments for fire insurance, which parts are denied, and III-6; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in: (1) that part of paragraph III-7, relating to the percentages of housing exceptions of Chittenden County residents, and (2) paragraphs IV-12 and IV-13 of the Complaint and, therefore, demands strict proof thereof, if deemed relevant; and denies each and every other allegation contained in the Complaint.

WHEREFORE, defendant respectfully requests this Honorable Court to dismiss plaintiff's Complaint.

DATED at Montpelier, County of Washington and State of Vermont, this 28th day of June, 1971.

Respectfully submitted,

JAMES M. JEFFORDS
Attorney General

By: /s/ Martin K. Miller
MARTIN K. MILLER
Assistant Attorney General
Montpelier, Vermont 05602

September 23, 1971

Hon. Bernard J. Leddy
Judge, U. S. District Court
Federal Building
Burlington, Vermont 05401

Re: Roberge v. Betit Civil Action No. 6301

Dear Judge Leddy:

After reviewing Johnson v. Harder, 438 Fed. 2d 7 (2d Cir. 1971) and your citation of that case in a recently decided matter of Linnane v. Betit, Civil Action No. 6046, I have decided not to submit the brief in the pending litigation in support of my position that there is no jurisdiction in this court.

I hereby wish to advise the court, however, that I am not withdrawing my jurisdictional defenses, but am merely foregoing the opportunity to submit a brief in support of them inasmuch as the court apparently feels bound by the decision of the Second Circuit in Johnson v. Harder.

Sincerely,

MARTIN K. MILLER
Assistant Attorney General

MKM/fcp

cc: John A. Dooley, III, Esq.
Vermont Legal Aid, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, on behalf of herself, her minor children and all persons similarly situated, Plaintiff	:	CIVIL ACTION NO. 6301
vs.	:	
JOSEPH W. BETIT, Commissioner of Social Welfare, Defendant	:	

ORDER

The parties in the above case having stipulated that the above action may proceed as a class action and appropriate notice may be given to the members of the class, in accordance with the stipulation of the parties, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That pursuant to Rule 23 of the Federal Rules of Civil Procedure all persons who are presently recipients of Aid to Needy Families with Children Assistance in Chittenden County and have, at any time since November 1, 1970, been denied benefits for rental housing costs in excess of the maximum allowance established by the Vermont Department of Social Welfare or for fire insurance or both, are hereby joined as a class of plaintiffs in the above named action.

2. That all members of the constituted class shall be notified of the pendency of this action;

3. That the notice shall be sent by mail by defendant to each member of the class not later than November 16, 1971, and shall include the request for exclusion from the class attached hereto;

4. That said notice shall be prepared by plaintiffs for distribution by defendant;

5. That said notice shall be in the following form:

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT
Burlington, Vermont 05401

NOTICE

Therese Roberge of Burlington, Vermont, has brought an action on behalf of herself and all persons who are presently recipients of Aid to Needy Families with Children Assistance in Chittenden County and have at any time since November 1, 1970, been denied benefits for rental housing costs in excess of the maximum allowances established by the Vermont Department of Social Welfare or for fire insurance costs or both, against Joseph W. Betit, Commissioner of Social Welfare of the State of Vermont, alleging that denial of benefits for said items is unconstitutional and violates provisions of the Social Security Act. Plaintiffs seek a declaration that such denials are unlawful, a permanent injunction against such denials in the future and an order requiring defendant,

his agents and servants to pay plaintiffs the welfare benefits they have been deprived of by virtue of the denial of benefits for such items.

If you are a resident of Chittenden County, Vermont and have been denied ANFC benefits since November 1, 1970 for part of your rental housing costs because they are in excess of the maximum allotments for housing or for fire insurance costs or both, you are a member of the class in the above described action. You will be excluded from the class if you so request by mailing the enclosed "Request for Exclusion from Class Action" to the Clerk of the United States District Court, Federal Building, Burlington, Vermont, on or before December 1, 1971. Any judgment whether favorable or not, will include all members of the class who do not request exclusion. You are entitled to pursue your own interests in this action by entering an appearance personally or through an attorney by notifying the Clerk of the United States District Court, Burlington, Vermont, on or before December 1, 1971.

This notice is not to be construed as conveying any opinion on the merits of plaintiffs claim but is merely intended to notify affected persons of the pendency of the action and their rights in regard to it.

/s/ Bernard J. Leddy
Bernard J. Leddy
United States District Court
for the District of Vermont

6. All appearances by members of the class shall be entered on or before December 1, 1971.

Done at Burlington, this 13th day of October, 1971.

/s/ Bernard J. Leddy
Bernard J. Leddy
United States District Court
for the District of Vermont

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

THERESE ROBERGE, on behalf of herself, her minor children and all persons similarly situated,

Plaintiff

v.

JOSEPH W. BETIT, Commissioner of Social Welfare,

Defendant

CIVIL ACTION
File No. 6301

REQUEST FOR EXCLUSION FROM CLASS ACTION

TO THE CLERK OF THE UNITED STATES DISTRICT COURT, FEDERAL BUILDING, BURLINGTON, VERMONT:

The undersigned respectfully requests to be excluded from the class in this action in accordance with the terms of Notice dated October 13, 1971.

I understand that by this request, I will not be entitled to share in the benefits of the judgment if it is favorable to the plaintiff, and that I will not be bound by the judgment rendered in this case if it is adverse to the plaintiff.

If you choose to be a member of the class, you may be represented by Vermont Legal Aid, Inc., without expense to you. In this case, you <u>should</u> <u>not</u> return this notice.

Dated ____ day of _____, 1971.

_____
(Name)

_____

_____
(Address)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, on behalf of herself, her minor children and all persons similarly situated, Plaintiff	)	
vs.	)	CIVIL ACTION NO. 6301
JOSEPH W. BETIT, Commissioner of Social Welfare, Defendant	)	

STIPULATION

The parties in the above entitled action, by and through their respective attorneys, hereby stipulate and agree that prior to the invocation of a three-judge court, the action may be heard by a single United States District Judge on Plaintiff's claim that the actions of defendant have violated the Social Security Act, 42 U.S.C. § 602 et seq., and regulations promulgated pursuant thereto.

Dated at Montpelier, this 10th day of December, 1971.

/s/ John A. Dooley, III
John A. Dooley, III
Vermont Legal Aid, Inc.
Attorney for Plaintiffs

/s/ Martin K. Miller
James Jeffords
Attorney General
by Martin K. Miller
Assistant Attorney General
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, On behalf of herself, her minor children and all persons similarly situated, Plaintiff	:	CIVIL ACTION NO. 6301
vs.	:	
JOSEPH W. BETIT, Commissioner of Social Welfare, Defendant	:	

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs, Therese Roberge and the class she represents, move that summary judgment be awarded in their favor on the grounds that no genuine issue exists as to any material fact and plaintiffs are entitled to judgment on the law. In support of this motion, plaintiffs refer the Honorable Court to the following:

a) The complaint and answer in this action;

b) Defendant's answers to interrogatories dated February 22, 1972 and filed in connection with this action;

c) Defendant's response to request to produce dated February 18, 1972 and filed in connection with this action;

d) Plaintiffs' requests to admit dated December 15, 1971 and filed in connection with this action. These requests are taken as admitted since defendant failed to file an answer or objection within thirty (30) days as

required by Rule 36 of the Federal Rules of Civil Procedure;

e) The affidavit of plaintiff, Therese Roberge, is attached to this motion.

Dated at Burlington, this 8th day of March, 1972.

/s/ John A. Dooley, III
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
192 Bank Street - Box 562
Burlington, Vermont

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing MOTION FOR SUMMARY JUDGMENT upon Martin K. Miller, Esq., Assistant Attorney General, Attorney for Defendant, by posting a copy of same in a United States mail receptacle, first class mail, addressed to his then last known office address, Office of Attorney General, Montpelier, Vermont, on this 8th day of March, 1972.

/s/ John A. Dooley, III
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
192 Bank Street
Burlington, Vermont

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, on behalf of herself, her minor children and all persons similarly situated, Plaintiff	:	CIVIL ACTION NO. 6301
vs.	:	
JOSEPH W. BETIT, Commissioner of Social Welfare, Defendant	:	

AFFIDAVIT

I, Therese Roberge, after first being sworn, state as follows:

1. During the year 1970, I was a recipient of Aid to Needy Families with Children (ANFC) assistance from the Department of Social Welfare on behalf of myself and my two minor children;

2. During the year 1970, I resided with my children in an apartment for which I paid one hundred and twenty-five ($125) dollars per month;

3. During the year 1970, I purchased fire insurance to insure the contents of my apartment against fire damage. The cost of this insurance was forty-six ($46) dollars for three (3) years;

4. Up until November 1, 1970, I received one hundred and twenty-five ($125) dollars per month from the Vermont Department of Social Welfare under the ANFC program to

cover the rent on the apartment I occupied;

5. Up until November 1, 1970, I received a monthly allotment from the Department of Social Welfare under the ANFC program to cover the cost of fire insurance on the contents of my apartment;

6. On November 1, 1970, the amount I received for rent from the Vermont Department of Social Welfare was reduced to one hundred and four ($104) dollars per month. On November 1, 1970, the amount I received from the Vermont Department of Social Welfare for fire insurance costs was discontinued;

7. At the present time, I am still receiving Aid to Needy Families with Children (ANFC) from the Vermont Department of Social Welfare. This welfare assistance constitutes the sole income of myself and my children;

8. At the present time, my rent is one hundred and twenty-five ($125) dollars per month and I have paid fifty-seven ($57) dollars for three years of fire insurance coverage;

9. At the present, I am receiving one hundred and four ($104) dollars per month from the Vermont Department of Social Welfare to cover my rent. I am receiving no allotment to cover the cost of my fire insurance.

Dated at Burlington, this 8th day of March, 1972.

/s/ Mrs. Therese Roberge
THERESE ROBERGE

Subscribed and sworn to before me this 8th day of March, 1972.

/s/ gloria ducharme
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

THERESA ROBERGE, on behalf of herself, her minor children and all persons similarly situated Plaintiffs	)	CIVIL ACTION
v.	)	FILE NO. 6301
JOSEPH W. BETIT, Commissioner of Social Welfare Defendant	)	

AFFIDAVIT

Bert N. Smith, being duly sworn and deposed, says:

1) Prior to November 1, 1970 fire insurance and water rent were recognized as special housing needs under shelter. On November 1, 1970 a regulation was promulgated which in effect considered these needs as clearly a part of and considered within the parameters of the maximum. In addition, all other special needs in the ANFC Progr including telephone, life insurance, special diets, and appliances were recognized for eligibility purposes but were ratably reduced 100% for payment.

2) The regulation was considered by Region I of HEW to be improper as to meeting the terms of Section 402 (a) (23) of the Social Security Act. In the months that followed (between November 1, 1970 and June 1, 1971) there was considerable discussion with Federal officials and various members of the department staff pertaining to the requirements of 402 (a) (23) as they relate to the November 1, 1970 regulation.

(3) The Department of Social Welfare decided with Federal officials that all special needs removed on November 1, 1970 and fire insurance and water rent should be costed and the amounts spent for these items uniformly and equitably be spread over the entire recipient load. I personally coordinated the collection of survey data pertaining to a 100% sample of all expenses in this area for the month prior (Oct. 70) to the month in which special need items and fire insurance and water rent were not funded.

4) The results of this survey showed the following costs for each item and were averaged over the October 1970 recipient load of 13,470.

Item	Cost	Per Recipient
Fire Ins. & Water Rent	$2,133.85	$ .16
Repairs	1,442.00	.11
Appliances	6,766.00	.51
Telephone	8,417.24	.64
Life Insurance	3,786.19	.29
Special Diets	942.04	.07
Educational Allow.	3,335.33	.25
School Tuition, Transp.	2,005.00	.15
		$2.18

5) On the basis of this survey a regulation #71-83 was issued on July 12, 1971 and an implementing bulletin #71-89 dated July 19, 1971 which effectively distributed the costs of special needs by incorporating within basic allowances an additional $2 per recipient. Since the inclusion of fire insurance and water rent at $.16 per recipient would not have increased the $2 per recipient allowance under basics due to the policy of rounding to the nearest dollar, it was decided by the agency to simply consider it as amply covered under the housing maximums currently existing and thus not necessary to raise the shelter maximum. It is recognized that the agency could have easily referred to fire insurance and water rent under its basic

llowances but chose to justify that the cost of such item was not ppreciable enough to cause the maximum to be raised. This is indicated by the wording in the third paragraph of Bulletin 71-89 dated uly 19, 1971 which states "fire insurance and water rent are contained within the maximums set forth for shelter."

6) I personally discussed this method thoroughly with Federal epresentatives who raised no objections to this methodology of veraging and costing average and are apparently now satisfied with he Vermont agency's conformity with Section 402 (a) (23) of the ocial Security Act and the correction of all action taken under the egulation of November 1, 1970.

7) The question of shelter exceptions has been raised by me personally in discussions with Federal officials. At no time was the agency advised that an item such as exceptions to shelter were to be considered as a part of the agency need standard or mandated for update consideration under 402 (a) (23) of the Social Security Act. The agency's deletion of an exception to standard has at no point been questioned by Federal officials. Exceptions are still contended to be not part of a state wide shelter standard of assistance which was uniformly applied state-wide as is required under 45 CFR 233.20 (a)(2).

/S/
Bert N. Smith
ANFC Program Director

STATE OF VERMONT
WASHINGTON COUNTY, SS.

Sworn to before me this 15th day of May, 1972 at Montpelier, Vermont.

/s/ Stacey Wegner
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERESA ROBERGE, on behalf of rself, her minor children d all persons similarly tuated Plaintiffs	)	CIVIL ACTION
v.	)	FILE NO. 6301
OSEPH W. BETIT, Commissioner f Social Welfare Defendant	)	

AFFIDAVIT

Vasili L. Bellini, being duly sworn and deposed, says:

1) As previous Director of Family Services during the period n question I had two distinct responsibilities bearing upon excep- ion requests. One was theformulation and interpretation of regula- ions and policies. The other was to make decisions on such requests

2) It was clearly not the intent at any time to look upon xceptions as part of the standard or to base eligibility on excep- ion requests. I have on more than one occasion explicitly stated his to Department employees as a general concept and in specific ases.

3) Exceptions were considered individually based upon the acts presented by the worker and approved by his immediate super- visor or the district supervisor. Although I would suggest that the majority of exceptions were granted, this was not done on a routine basis.

4) The purpose of exceptions was to prevent primarily financial and also social hardship for a recipient of assistance. Most of the time the reasons for granting exceptions were personal to the recipients. In other words, if two families applied for exceptions,

each with equal financial resources, one might have gotten a housing exception because of the social circumstances or the personal feel of the case, while the other could have been refused. In many instances exceptions were granted to prevent family separation because of the potential loss of or lack of a suitable home. Particularly in housing for families, exceptions were seen (and in fact granted) as a temporary solution to a housing problem while a more permanent solution was found. Of course the Department always weighed applications for exceptions against the general availability of funds.

/s/
Vasili L. Bellini
Director of Operations

STATE OF VERMONT

WASHINGTON COUNTY, SS.

Sworn to before me this day of May, 1972, at Montpelier, Vermont.

Notary Public

[Excerpt from Defendant's Reply Memorandum of Law in Opposition to Motion for Summary Judgment of May 16, 1972]

Introduction

The present memorandum responds to points raised by plaintiff at oral argument and in her own Memorandum, particularly point III of that Memo. Additional affidavits are filed in support of this memorandum with particular reference to the points raised by plaintiff at oral argument and in her Memorandum.

The plaintiff has moved for summary judgment, and the defendant continues strenuously to oppose such motion on the "exceptions" issue . . . but fully agrees that the "area differential" issue . . . is susceptible of summary judgment . . . To such extent the defendant moves for summary judgment in its favor. Certain points of the affidavits presented herewith are responsive to the defendant's motion for summary judgment on such issue.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

THERESA ROBERGE, on behalf of herself, her minor children and all persons similarly situated Plaintiffs v. JOSEPH W. BETIT, Commissioner of Social Welfare Defendant	)	CIVIL ACTION FILE NO. 6301

AFFIDAVIT

Edward Pirie, being duly sworn and deposed, says:

1) I am Chief of Research and Statistics for the Vermont Department of Social Welfare. I have held this position for almost nine years and have held positions in the field of Statistics prior to returning to Vermont. After receiving a degree in Economics from Dartmouth, I undertook additional studies in the field of Statistics.

2) In answer to any statement that the rent maximum of $100 a month in Chittendent County and $85 for the rest of the State imposed in 1967 were not based upon factual data and did not represent actual differences in cost, let me say that data was collected in 1967 to determine the costs to the Department of the removal of the statutory maximum on certain ANFC payments. While no specific housing survey as such was conducted (and this may be the reason I did not respond earlier when asked for "housing surveys") as a by-product of the data collection I just spoke of, there were rent figures used in arriving at the amount which we finally imposed as rent maximums. I have gone through the same kind of "desk review" we went through in 1967 and have compiled these materials. They are attached as "Annex A". These figures show that $100 a month in Chittenden County covered

97% of the cases and $85 a month in the rest of the State covered 97% of the cases.

3) I understand from counsel that the argument has been made that shelter exceptions in Chittenden County are in fact part of the maximum. I am not directly familiar with the practice of social workers in Chittenden County since this was not my job, but a few comments are in order from a statistical point of view. I note that only 8% of the Chittenden County housing cases were granted shelter exception. In light of the exception rate throughout the State and the minimal number of exceptions per hundred cases in Chittenden County, I can see no valid statistical basis for saying that exceptions should be part of the maximum in Chittenden County and not elsewhere.

4) The update of shelter maximums was not an isolated action but part of a Federally mandated update of all standards including, besides shelter, the basic standard encompassing food, clothing, fuel utilities, personal needs, incidentals and chore service. This was estimated to cost the Department $80,000. a month as opposed to the 3,754. a month figure saved by the removal of shelter exceptions. Also, the subsequent averaging back into the budget of special needs is at a greater than previous monthly cost. These calculations are shown in the attachments. Even an analysis of just those cases who had shelter exceptions removed showed an average net increase of .34 per month in welfare payments as per the documents in "Annex B".

5) To clarify figures given out by the Department to Legal Aid, when we said that the elimination of exceptions saved $31.50 per SC exception case, this was based on a 10% statewide sample. The .61 figure is based on a statewide analysis of all survey records and is therefore more accurate.

6) Based on the figures in my Annex "C" the saving per statewide ANFC case receiving the maximum (including exception and non-exception recipients) was $5.07.

7) The cost of the May 1, 1970 update of the Vermont housing maximums was a total of $2650.00.

/s/ Edward Pirie
Chief of Research and Statistics

STATE OF VERMONT

WASHINGTON COUNTY, SS.

Sworn to before me this 15th day of May, 1972, at Montpelier, Vermont.

/s/ Stacey Wegner
Notary Public

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, On behalf of herself, her minor children and all persons similarly situated, Plaintiff	:	
	:	CIVIL ACTION NO. 6301
vs.	:	
JOSEPH W. BETIT, Commissioner of Social Welfare, Defendant	:	

MOTION TO STRIKE, OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR CONTINUANCE

Plaintiffs, Therese Roberge and the class she represents, moves the Honorable Court in the above entitled action as follows:

1. To strike the affidavits of Bert Smith, Vasili Bellini and Edward Pirie, filed by defendant on May 1, 1972 on the grounds that they were not served prior to the day of the hearing on plaintiffs' motion for summary judgment as required by Federal Rule 56(c) and lease was not sought to submit them after the hearing as required by Federal Rule 56(f).

2. To strike the affidavit of Edward Pirie, filed by defendant on May 1, 1972 on the ground that it contains matter that was within plaintiffs' request to produce on December 15, 1971 and that defendant failed to supply said matter as required by Federal Rule 34.

3. To deny defendant's motion for summary judgment pursuant to Rule 56(f) on the ground that according to the affidavit of plaintiff's counsel (attached), plaintiff can not properly respond to the motion because of defendant's failure to submit properly to discovery.

4. If the above motions are denied, to order a continuance to allow plaintiffs to engage in further discovery.

DATED at Burlington, this 19th day of May, 1972.

THERESE ROBERGE

By /s/ John A. Dooley, III
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
192 Bank Street - Box 562
Burlington, Vermont

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing MOTION TO STRIKE, OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT and MOTION FOR CONTINUANCE upon Benson Scotch, Esq., Assistant Attorney General, by posting a copy of same in a United States receptacle, first class mail, addressed to his then last known office address, Department of Social Welfare, Montpelier, Vermont 05602 on this 19th day of May, 1972.

/s/ John A. Dooley, III
JOHN A. DOOLEY, III,
Vermont Legal Aid, Inc.
Burlington, Vermont

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, on behalf of herself, her minor children and all persons similarly situated, Plaintiff	:	CIVIL ACTION NO. 6301
vs.	:	
JOSEPH W. BETIT, Commissioner of Social Welfare, Defendant	:	

AFFIDAVIT

I, John A. Dooley, III, after first being sworn, state as follows:

1. I am counsel for plaintiffs in the above entitled action.

2. On December 15, 1971, I submitted to defendant a request to produce in which I requested copies of all statistical surveys or studies performed by the Vermont Department of Social Welfare at any time on or after January 1, 1966 and showing the cost of rental housing for ANFC recipients within Chittenden County.

3. On February 18, 1972, defendant filed a response to request to produce purporting to produce all surveys or studies requested. This response contains determinations of average and median rent of ANFC recipients based upon sampling of ANFC cases at various times.

4. On May 15, 1972, defendant filed a motion for summary judgment. That motion is based on a housing survey conducted in 1967 and contained in an affidavit of Edward Pirie filed May 15, 1972. The survey contains a random sampling of rental housing expenses of ANFC recipients arriving at a maximum and an average. The survey was not produced on February 18, 1972 even though it was within the scope of the request to produce.

5. I have no way of knowing how many other rental housing surveys have been taken by the Vermont Department of Social Welfare and not produced in response to my request. I cannot determine from the information provided in the affidavit of Edward Pirie how the survey of 1967 was conducted. As a result, I am unable to respond to defendant's motion for summary judgment of May 15, 1972.

DATED at Burlington, this 19th day of May, 1972.

/s/ John A. Dooley, III
JOHN A. DOOLEY, III, Esq.
Vermont Legal Aid, Inc.
Burlington, Vermont

Subscribed and sworn to before me this 19th day of May, 1972.

/s/ gloria ducharme
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Therese Roberge, on behalf of herself, her minor children and all persons similarly situated	:	Civil Action
vs.	:	No. 6301
Joseph W. Betit, Commissioner of Social Welfare	:	

OPINION and ORDER

This case is before the court on cross motions for summary judgment under Fed. R. Civ. P. 56. Several procedural issues must be decided, however, before the motions for summary judgment can be reached.

I. Plaintiff's Motion to Strike All of Defendant's Affidavits Submitted on May 15, 1972, and Defendant's Motion for Leave to File Out of Time.

On March 10, 1972, plaintiff filed a motion for summary judgment without filing any accompanying memorandum articulating her legal theories. On April 21, 1972, defendant filed a memorandum and accompanying affidavit in opposition to plaintiff's motion for summary judgment. He did not, however, make a request pursuant to Rule 56(f) for an extension of time to prepare additional opposing affidavits. A hearing was held on the summary judgment motion on April 24, 1972. On April 27, plaintiff filed her first and only memorandum fully articulating her legal theories. Defendant filed a reply brief on May 16. Appended to the reply brief were additional

affidavits supporting the arguments made therein.

Plaintiff has now moved to strike these affidavits on the grounds that under Rule 56(c) they had to be served one day before the April 24 hearing absent a granted extension of time pursuant to Rule 56(f). Defendant contends that he did not glean the direction of plaintiff's arguments until after the April 24 hearing and the submission by plaintiff of her April 27 memorandum. Defendant now explicitly does what he suggests he implicitly did in his May 15 memo; he moves for permission to file additional affidavits under Rule 56(e).

Under Rule 56(e), when read together with Rule 6(d) and 6(b)(2), a trial court has discretion to admit affidavits even though the technical requirements of Rule 56(c) have not been complied with. Beaufort Concrete Co. v. Altantic States Construction Co., 352 F.2d 460, 462-63 (5th Cir. 1965), cert. denied, 384 U.S. 1004 (1966), 3 Barron & Holtzoff, Federal Practice and Procedure § 1237 at 167 (Wright ed. 1958); 6 Moore, Federal Practice ¶ 56.14(1) at 2256 (1971).

Since summary judgment is an extraordinary procedure and the motion is not lightly to be granted, every opportunity is usually made to allow the opposing party to show a genuine issue of fact exists. Cf. 3 Barron & Holtzoff, Federal Practice and Procedure § 1237 at 122 (Supp. 1972). Plaintiff makes no claim that any substantial prejudice to her results from the admission of the affidavits.

Plaintiff's motion to strike is denied. All motions for leave to file affidavits or memoranda out of time are hereby granted.

II. Plaintiff's Motion to Strike the Affidavit of Edward Pirie Submitted by Defendant on May 16, 1972.

Plaintiff makes a separate argument for striking Edward Pirie's affidavit, since appended to it is a Department of Social Welfare "desk review" which defendant admits should have been produced in response to plaintiff's request t produce of December 15, 1971. (Defendant's Memorandum in Opposition to Motion to Strike at 5). This desk review shows the existence of some statistical survey prior to the setting of different rent maximums for Chittenden County and the rest of the state. It does not, however, affect the disposition of plaintiff's motion for summary judgment on the intrastate differential issue. Plaintiff admits that a later survey showing housing cost differences between Chittenden County and the rest of the state exists. See Plaintiff's Memorandum of April 27 at 6. Defendant therefore does have a basis for setting an intrastate differential even without the Pirie affidavit. The only issue is the legal one whether the differential set must fully reflect cost data.

Defendant argues that a motion to strike under Rule 37(b)(2)(C) does not lie in the absence of a court order compelling discovery. Defendant's contention on this point is clearly wrong. Defendant violated Rule 34 by failing to produce. Sanctions for the violation of Rule 34 are set forth in Rule 37(b)(2)(A), (B) and (C) and under Rule 37(d). These may be imposed without a court order compelling discovery.

8 C. Wright & A. Miller, Federal Practice and Procedure, § 2291 at 807 (1970). Thus the court could order the affidavit struck if it were just to do so.

The omission was not willful, however, because the Pirie affidavit helps the defendant's position rather than hurts it. The "desk review" was not strictly a housing study as requested in plaintiff's December 15 motion to produce and it is understandable that the layman handling the request to produce did not so construe it. Moreover, as soon as the oversight was discovered, the survey was supplied.

In the exercise of the trial court's discretion, C. Wright & A. Miller, supra § 2284 at 764, the motion to strike is denied.

There is a strong aversion to preventing adjudication on the merits with discovery sanctions. Id. § 2284 at 772; Waterman, An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pre-Trial Orders, 29 F.R.D. 420, 425 (1960). If plaintiff was caused expense by the omission, plaintiff may seek relief under Rule 37(d).

III. Plaintiff's Motion to Deny or Continue Defendant's Motion for Summary Judgment.

When defendant submitted the affidavits described above, he also moved for summary judgment on the issue of intrastate differentials. Plaintiff claims that this motion was based on the affidavit of Edward Pirie and moves pursuant to Rule

56(f) that in the event her motion to strike the Pirie affidavit is denied, the court either deny or continue defendant's summary judgment motion. Plaintiff has submitted the affidavit required by Rule 56(f) stating that she cannot respond to defendant's motion for summary judgment without further discovery.

A motion to deny or continue a motion for summary judgment is within the discretion of the court. The moving party, however, must show that without further discovery he cannot present facts essential to justify his opposition. 3 Barron & Holtzoff, supra § 1238 at 173-74.

Defendant is correct that plaintiff's motion should be denied because his motion for summary judgment does not depend on any facts in the Pirie affidavit. Plaintiff is arguing that if cost differences for different areas of a state are taken into account in setting levels of welfare payments they must be fully taken into account. As previously mentioned, neither plaintiff nor defendant denies there are cost differences for shelter between Chittenden County and the rest of the state and that survey statistics establish those differences. (Plaintiff's Memorandum of April 27 at 6; Defendant's Memorandum of May 16 at 8). Their disagreement is on the purely legal proposition advanced by plaintiff. Further discovery into the methods used in the "desk review" appended to the Pirie affidavit, as plaintiff proposes, could not affect the fact that a concededly adequate survey taken in 1969 does justify some cost differential.

Plaintiff's motion is therefore denied.

IV. The Cross Motions for Summary Judgment.

1. Area differentials in rental maximums. Part of the allowance given to beneficiaries under Vermont's Aid to Needy Families with Children (ANFC, called Aid to Families with Dependent Children or AFDC elsewhere) program is an allocation for shelter needs. In 1967 Vermont adopted a special standard to determine the maximum shelter allowance for ANFC recipients in Chittenden County as compared to ANFC recipients in other parts of the state. This 1967 differential provided a maximum of $100 a month for rental costs in Chittenden County as compared to a maximum of $85 a month in the rest of the state. On December 1, 1967, the rental maximums began to distinguish between unfurnished and furnished apartments, providing for a maximum of $100 a month for an unfurnished apartment in Chittenden County, as compared to $85 a month in the rest of the state but providing for no differential in the maximum for furnished apartments. On May 1, 1970, the maximums were updated to their current level, $104 a month for an unfurnished apartment in Chittenden County as compared to $88 a month in the rest of the state with no intrastate differential for furnished apartments. (See Answers to Interrogatories Exhibit B.) As previously discussed both plaintiff and defendant acknowledge cost studies have been done at some point which show that the actual differences in shelter costs between Chittenden County and the rest of the state far exceed the intrastate differences between rental maximums. (See summary in Plaintiff's Memorandum of April 27

at 2 and Exhibit 1.)

ANFC is funded jointly by state and federal funds. If Vermont wants to receive federal funds it must comply with federal requirements as to how those funds are spent. Acting pursuant to a statute, the Department of Health, Education and Welfare (HEW) requires that a state AFDC plan:

> Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis.
>
> ... Specify a state-wide standard, expressed in money amounts, to be used in determining (a) the needs of applicants and recipients and (b) the amount of the assistance payment.
>
> ... Provide that the standard will be uniformly applied throughout the state.

45 C.F.R. § 233.20(a)(1), (2) (1970).

HEW has interpreted these regulations to permit intrastate differentials but has stated that: "Any variation in cost standards by areas within a state must be justified by facts." HEW, Simplified Methods for Determining Needs 1 (1964), quoted in Plaintiff's Memorandum of April 27 at 5.

In Boddie v. Wyman, 434 F.2d 1207 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971), AFDC recipients living outside of New York City relying on the HEW regulations challenged an intrastate differential which gave them a lower level of benefits as compared to New York City AFDC recipients. The court held the HEW regulations valid and went on to hold that under them the New York intrastate differential had to fall since "the evidence presented to the district court tends to establish

establish the absence of any objective justification for these differentials." 434 F.2d at 1211 (emphasis added).

Plaintiff, representing the class of welfare recipients in Chittenden County who receive the maximum shelter allowance, seeks to have the Vermont rental maximum differential declared invalid because it does not fully reflect the differences in rental costs between Chittenden County and the rest of the state. Both plaintiff and defendant have moved for summary judgment.

Boddie is distinguishable from this case. In Boddie, the challenge was brought by AFDC recipients who were receiving a smaller allotment than other AFDC recipients in the state. Here, the challenge is brought by the favored AFDC recipients claiming the amount by which they are favored is insufficient. In Boddie the intrastate differential was not based on any objective justification. In fact, as the Boddie court noted: "Every study undertaken by the [New York Welfare] Department . . . has confirmed . . . that . . . there is no objectively verifiable [intrastate] difference in cost." 434 F.2d at 1211. In our case there are studies establishing the cost differential for housing between Chittenden County and the rest of the state.

Plaintiff concedes that it is not incumbent on the State to take the intrastate cost differential into account at all. (Plaintiff's Memorandum of April 27 at 6 citing 45 C.F.R. § 233.20(a)(2).) But she argues that once regional differences are set they must be based fully on cost.

Plaintiff's position can be justified on the grounds that the HEW regulations are designed to deter states from setting up intrastate differentials. If such differentials have to be funded by the states to the full extent of cost differences, the extra expense will discourage the states from establishing them. Congressional concern and HEW regulations, however, do not seem to be directed at area differentials in general but at unjustified and arbitrary differentials. See Boddie at 1210. Unlike the New York differential in Boddie, the Vermont differential appears neither irrational nor arbitrary. If costs are actually greater in one section of a state than in another, states should not be deterred from allocating their welfare funds to where the need is greatest.

Plaintiff's position also conflicts with the traditional discretion Congress and HEW have given states in setting their level of welfare benefits. See Dandridge v. Williams, 397 U.S. 471, 478 (1970); Rosado v. Wyman, 397 U.S. 397, 408-09 (1970). Cf. Rothstein v. Wyman, Docket No. 72-1359 (2d Cir., Sept. 7, 1972), slip op. at 4487 (retroactive payments). The allocation of welfare funds under the state's political process should not be lightly interfered with. Vermont has partially mitigated the housing cost differential between Chittenden County and the rest of the state but has decided that other welfare needs are more pressing than fully eliminating the cost disparity. If HEW wants to interfere with that decision, it should speak clearly on the issue. It has not done so here. Given the

increasing concern the Supreme Court and Second Circuit Court of Appeals have expressed about federal court interference in state welfare systems, Rosado at 422; cf. Dandridge at 487; Rothstein, slip op. at 4503 et seq., plaintiff's motion for summary judgment is denied and defendant's motion granted on this issue.

2. The elimination of rental exceptions and allotments for fire insurance. Vermont's ANFC program is called AFDC in most other states. AFDC is, of course, one of four categorical aid programs under the Social Security Act, all of which are jointly funded by the state and federal governments. One of the federal requirements each state must satisfy to receive funds is to compute a budget of items necessary for basic subsistence for AFDC recipients, the budget being a "standard of need." A state, however, traditionally has considerable discretion in pricing the items that go into the standard of need and does not have to set the actual level of benefits in accordance with the standard of need. See Rabin, Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration, 118 U. Pa. L. Rev. 1143, 1145 (1970).

The actual benefits paid are computed according to several different methods, three of which are of particular interest for our purposes:

1. Some states simply pay 100 per cent of the standard of need.

2. Other states pay a percentage of the standard of

need, which is usually referred to as taking a "ratable reduction" from the standard of need.

3. A third method is simply to place a maximum on the amount of benefits paid to each family. The size of the benefits increase as the size of the family increases up until the family reaches a certain size. When it reaches that size, the family no longer receives additional benefits. See Dandridge v. Williams, 397 U.S. 471 (1970)(upholding constitutionality of family grant maximums).

Various combinations of the above are also possible. For example, a state may select a particular item such as shelter costs from its overall standard of need and place a family size maximum limitation on that item while setting additional benefits as a percentage of the standard of need computed without shelter. Or a state might place a family size maximum on total welfare benefits but allow additional payments if an AFDC recipient can show he really needs them.

For a long time the states had virtually complete discretion in the choice between these various methods of computation in addition to discretion in determining the standard of need. As a result the level of AFDC benefits varied enormously from state to state. See generally Rabin, supra at 1145.

To mitigate somewhat these variations, in 1967 legislation was introduced to require states to update the pricing of the items in the standards of need in accordance with changes in the cost of living and to pay benefits at 100 per

be to encourage states to adopt standardless programs and eliminate them with financial impunity every time welfare budget cuts were required by internal state politics. Thus, the scope of opportunity for arbitrariness on the part of welfare officials might be increased. In defendant's affiant's own words, "In other words, if two families applied for exceptions, each with equal financial resources, one might have gotten a housing exception because of the social circumstances or the personal feel of the case, while the other would have been refused." [Vasili L. Bellini's affidavit at 2 (underscoring supplied).] This type of exception the court will not condone.

Defendant's second argument, that the level of benefits to the total ANFC population did not decrease as a result of the elimination of rental exceptions, is legally irrelevant. Under Rosado when a state readjusts its level of welfare benefits, it must account for and fairly price all items previously provided for under its old overall standard of need. 397 U.S. at 419. The allowance for housing was a component of Vermont's overall standard of need. The November 1, 1970, elimination of housing exceptions was, in effect, a downward adjustment of the overall standard of need. Although the payment for the "basic allowance" component of the overall standard of need was increased from 87 to 100 per cent of the separate standard of need for that component, that increase did not take into account the reduced level of housing benefits. It is not significant that some welfare recipients received

a small overall increase in their ANFC aid as a result of Vermont's November 1, 1970, changes in welfare allotments while others, like the representative plaintiff in this case, may have registered an overall decrease. The important point is that the state appeared generous by raising its basic allowance allotment from 87 to 100 per cent of need while in actuality all it has done is shuffle funds from one group of ANFC recipients to another. Whether that decision is right or wrong is not relevant. What is relevant under Rosado is that § 402(a)(23) requires it to be made in a way that maximizes its political visibility.

While it is tempting to grant plaintiff's motion for summary judgment accordingly, defendant will be given the opportunity at a hearing on the merits to substantiate with evidence his argument that the rental exceptions were a totally insignificant part of the overall ANFC program.

Plaintiff contends that the November 1, 1970, change in the status of reimbursement for fire insurance costs is either (1) a lowering of the rent maximums or (2) an imposition of a maximum on fire insurance. She gives us a hypothetical case:

> An ANFC recipient resides in an unfurnished apartment in Burlington and pays $100/month for rent and $10/month for fire insurance. Prior to Nov. 1, 1970, the recipient is given $110/month to cover rent and fire insurance [the rental maximum plus her fire insurance costs]. After Nov. 1, 1970 she only receives $104/month for both items.

The imposition of the $104 maximum for rent and fire insurance in plaintiff's view is in effect a placing of a $94/month maximum on rent, a reduction from the previous maximum of $100/month. Alternatively plaintiff argues it can be viewed as placing a $4/month maximum on fire insurance costs where none previously existed.

As previously discussed, imposition of maximums that reduce the overall level of welfare benefits is inconsistent with § 402(a)(23), for a major purpose of the statute is to provide an incentive for states to shift from maximum to ratable reduction systems. If that were all there were to this issue, plaintiff would be granted summary judgment. Defendant argues, however, that all it has done is taken the total amount of money previously spent for special needs (including fire insurance), divided that amount by the total number of ANFC recipients, and increased the allotment for basic needs by the resultant figure. See Affidavit of Bert Smith at ¶¶ 3-6. Fire insurance, in effect, was costed into basic needs on an average basis. This is in contrast to the procedure followed for the elimination of rental exceptions, because although the payments for basic needs were increased, housing was not included as a component of basic needs. Thus, if the defendant's contentions are correct, even though new maximums were in effect imposed on fire insurance or on rent by the new treatment of fire insurance costs, the total allotment of funds over the entire ANFC recipient load did not decrease. Under Rosado, it is permissible

cent of that revised standard. This proposed legislation was not enacted. Instead, after virtually no debate (see Rosado at 409-12 and Rabin at 1146-49 for a review of the legislative history), Congress enacted the Needy Families with Children Aid and Services Acts § 402(a)(23), 42 U.S.C. § 602(a)(23) (1968), which says:

> [The states shall] provide that by July 1, 1969 the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

A judicial battle between the states and welfare recipients then ensued as to whether or not § 402(2)(23) required any increases in welfare benefits. In Rosado v. Wyman, 397 U.S. 397 (1970), the Supreme Court gave each side something. At issue in Rosado was New York's change of plan from computing welfare benefits on the basis of a standard of need for recurring items (e.g., food and clothing) and additional allowances for "special" needs to a family maximum grant system with no provision for obtaining additional allowances.

Before evaluating the change in New York's plan, the Court conducted a detailed examination of the legislative history and probable purposes of § 402(a)(23). Finding the legislative history not compelling, the Court discerned two purposes from the words of the statute and "common sense assumptions," 397 U.S. at 412:

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

397 U.S. at 412-13.

The Court rejected the argument that this interpretation of the legislative history and purposes of § 402(a)(23) made the statute a "meaningless exercise in bookkeeping." It found the statute had the consequences of:

> ... requiring the States to recognize and accept responsibility for those additional individuals whose income falls short of the standard of need as computed in the light of economic realities and to place them among those eligible for the care and training provisions [to which AFDC eligibility is prerequisite]. Secondly, while it leaves the states free to effect downward adjustment in the level of benefits paid, it accomplishes within that framework the goal, however modest, of forcing a state to accept the political consequences of such a cutback and bringing to light the true extent to which actual assistance falls short of the minimum acceptable. Lastly, by imposing on those states that desire to maintain "maximums" the requirement of an appropriate [cost of living] adjustment, Congress has introduced an incentive to abandon a flat "maximum" system, thereby encouraging those states desirous of containing their welfare budget to shift to a percentage system that will more equitably apportion those funds in fact allocated for welfare and also more accurately reflect the real measure of public assistance being given.

397 U.S. at 413-14.

In light of its interpretation of the purposes and effects of § 402(a)(23) the Court held the New York change of plan inconsistent with the statute. New York's new plan produced an enormous reduction in total state welfare benefits

(397 U.S. at 416-17) and the new flat grant system did not make any provision for the many items previously provided for by special grants. New York was held to have altered the content of its standard of need in a manner inconsistent with § 402(a)(23).

Prior to November 14, 1970, ANFC benefit levels in Vermont were determined by the sum total of three components:

A. A "basic allowance" which covers all needs but shelter. ANFC recipients received 87 per cent of their standard of need for the items contained within the basic allowance.

B. A shelter allowance which was paid up to the maximums described previously. However, the maximums were not rigid. "Exceptions" were given for some ANFC recipients who had rental costs in excess of the maximums.

C. Special allotments for incidental items including fire insurance were made available to ANFC recipients who could demonstrate need. These allotments were for the full cost of the item without any maximum.

On November 1, 1970, the following changes were made in the method of computing payments:

A. The stipend for the basic allowance was raised from 87 to 100 per cent of the standard of need.

B. All exceptions to the rental housing maximums were eliminated.

C. Special allotments for fire insurance were eliminated. Fire insurance costs were brought within the

rental maximums so that a recipient who could previously obtain payment for fire insurance without limit could now be reimbursed only if the combined cost of fire insurance and rent were below the applicable maximums.

The representative plaintiff before November 1, 1970, had an exception to the applicable rental maximum and received a $125 per month allotment for rent. She also paid $46 for three years' fire insurance coverage and was reimbursed by ANFC in monthly installments. On November 1, 1970, her rental allotment was decreased to $104 per month and her fire insurance allotment was eliminated. It is probable that she received an increase of her basic allowance payments but the amount or the total gain or loss to her in ANFC benefits as a result of the November 1, 1970, changes does not appear.

Plaintiff argues that the elimination of rental exceptions and the new treatment of fire insurance violated § 402(a)(23). She has moved for summary judgment in her favor on those issues. Defendant contests the motions for summary judgment, particularly on the issue of the permissibility of eliminating rental exceptions, on the grounds that issues of material fact must be settled at trial.

Plaintiff contends that the rental exceptions were part of the rental maximums and the elimination of the exceptions was, in effect, a lowering of the rental maximums. A

lowering of the benefit maximums which reduces overall benefits to welfare recipients would defeat one of the purposes of § 402(a)(23) as interpreted in Rosado, that the states have an incentive to move away from maximum systems to more equitable ratable reduction schemes. The only way the payment made for an item that has a maximum on it can be reduced consistent with § 402(a)(23) is to change the state plan by proportionally adjusting the maximum in a percentage reduction system. Alvarado v. Schmidt, 317 F. Supp. 1027, 1036 (W.D. Wis. 1970)(three-judge court)(percentage reduction based on national average of state benefits improper since unrelated to state need).

Defendant does not challenge the above reasoning but argues that it is inapplicable to this case because:

1. The rental exceptions were never part of the housing maximums. He argues such exceptions were made totally at administrative discretion and not as a guarantee of anything to recipients. He argues that at the very least a trial is needed on this issue.

2. Defendant also argues that the elimination of exceptions did not result in decreased benefits to welfare recipients but rather that the money saved was used to increase the benefits of ANFC recipients from 87 to 100 per cent of their standard of need on the basic allowance.

On the date of deletion of the Vermont exceptions, out of 3,166 ANFC cases in which a shelter allowance was granted, it appears 159 or 5 per cent of the recipients had exceptions. (Answer to interrogatories, Exhibit A.)

The question becomes whether they were available to more than an insignificant number of recipients and should be considered an integral part of the overall ANFC program. Cf. Rosado, 397 U.S. at 418 (items such as laundry and telephone expenses cannot be eliminated from a state standard of need if "regular recurring expenses" to a significant number of welfare recipients).

Defendant's own affiant alleges that one of his responsibilities bearing on rental exceptions was "the formulation and interpretation of regulations and policies" to deal with requests. (Affidavit of Vasili L. Bellini.) This is persuasive evidence that there were overall policy guidelines to deal with exception requests and that they were not left solely to the discretion of individual welfare officials.

But even if exceptions were totally at administrative discretion there would be strong policy reasons to hold they were still part of the rental maximums. One of the great complaints poor people have about the welfare system is the arbitrariness of some of its administrators. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970)(fair hearing required before termination of welfare benefits). To allow benefits granted to a significant number of ANFC recipients to be eliminated because no administrative standards existed to determine who received them would

for states to consolidate items on the basis of statistical averages, even though "such averaging may affect some families adversely and benefit others," and even though "net payout, assuming no change in the level of benefits, may be somewhat less under a streamlined program." 397 U.S. at 419. Defendant contends that is all that happened here with respect to fire insurance reimbursements.

Plaintiff has introduced no evidence or made no contention to dispute defendant's argument. Defendant should be given an opportunity to prove the accuracy of his contentions.

Plaintiff's motions for summary judgment on these issues are denied.

The court notes that plaintiff's complaint asks for damages, presumably retroactive payment of benefits. In Rothstein v. Wyman, Docket No. 72-1359 (2d Cir., Sept. 7, 1972), the court denied retroactive payment of welfare benefits as a remedy for state violation of federal requirements, finding such payments an abuse of equitable discretion and a violation of the eleventh amendment. Parenthetically that decision seems controlling on the damage claim here.

Done at Brattleboro in the District of Vermont, this 13th day of October, 1972.

/s/ James L. Oakes
U. S. Circuit Judge
(sitting by designation
as a U. S. District Judge)

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Therese Roberge, on behalf of herself, her minor children and all persons similarly situated	:	Civil Action
vs.	:	File No. 6301
Paul Philbrook, Commissioner of Social Welfare	:	

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

I. Background and Procedural History of the Case.

This action, commenced June 9, 1971, challenges, inter alia, certain procedures of the Vermont Department of Social Welfare on the basis that they are inconsistent with section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23). On October 28, 1971, upon the stipulation of the parties, the action was declared a class action limited to a class of Aid to Needy Families with Children (ANFC) recipients in Chittenden County. Thereafter, both parties filed motions for summary judgment. By opinion and order dated October 14, 1972, Judge Oakes, sitting by designation as United States District Judge, disposed of all but two of the issues presented in this case.

A hearing was held on September 9, 1973 concerning these two issues at which evidence was presented by both parties. On March 8, 1974, in belated compliance with the Court's instruction at the hearing, the parties filed a joint

proposal for findings of fact, followed on March 18, 1974, by memoranda of law in support of their respective positions.

II. Issues Presented for Determination After Trial by Judge Oakes' Opinion and Order of October 14, 1972.

The relevant portions of Judge Oakes' opinion on the cross-motions for summary judgment will be reviewed in detail infra. The issues presently before us as framed by that opinion are as follows:

1. Were the exceptions to the shelter grants allowed to certain recipients of ANFC benefits prior to November 1, 1970 a significant or insignificant part of the ANFC program?

2. Was the November 1, 1970 alteration in the manner of providing fire insurance reimbursements to ANFC recipients accounted for in the basic needs standard in a manner consistent with section 402(a)(23) of the Social Security Act?

III. Findings of Relevant Fact.

In accordance with the limited scope of our inquiry at this stage of the proceeding, only those facts relevant to the issues presently under consideration will be set forth in this opinion. We find those facts to be as follows:

1. During 1970 the named plaintiff, Therese Roberge, received ANFC benefits for shelter in the amount of $125.00 per month. This amount consisted of $104.00 per month as

the maximum amount allowed for rent for an unfurnished dwelling place in Chittenden County plus a $21.00 special shelter exception [1] granted to her under then existing policy because her rent exceeded the applicable maximum for shelter.

2. Prior to November 1, 1970, the state-wide ANFC caseload [2] was 3,763 [3] cases. One hundred fifty-nine or 4.2 per cent of the total state-wide ANFC caseload received shelter exceptions.

3. Prior to November 1, 1970, the state-wide ANFC caseload receiving shelter grants was 3,166 cases. One hundred fifty-nine or 5 per cent of the state-wide ANFC caseload receiving shelter grants also received shelter exceptions.

4. Prior to November 1, 1970, in Chittenden County, the ANFC caseload receiving shelter grants was 961 cases, 77 or 8 per cent of which received shelter exceptions. [4]

5. Prior to November 1, 1970, shelter exception expenditures amounted to .5 per cent (.005) of all expenditures in the ANFC program.

6. Prior to November 1, 1970 shelter exception expenditures amounted to 1.6 per cent (.016) of all expenditures for shelter in the ANFC program.

7. Prior to November 1, 1970, in Chittenden County, shelter exception expenditures amounted to approximately

1.2 per cent (.012) of all expenditures in Chittenden County for the ANFC program.

8. Prior to November 1, 1970, in Chittenden County, shelter exception expenditures amounted to approximately 3 per cent of the expenditures for shelter in the ANFC program in Chittenden County.

9. On November 1, 1970, new ANFC regulations were promulgated by the Vermont Department of Social Welfare which eliminated shelter grant exceptions.

10. Pursuant to these regulations, after November 1, 1970, no ANFC recipient in Chittenden County could receive more than $104.00 for an unfurnished dwelling place with no fuel or utilities supplied as the shelter component of the basic need standard. In the remainder of the state an $88.00 maximum for an unfurnished residence with no fuel or utilities supplied was placed upon the shelter component of the basic need standard.

11. As a result of the elimination of shelter grant exceptions, plaintiff's monthly grant for shelter was reduced from $125.00 to $104.00 although her costs for shelter did not decrease.

12. Prior to November 1, 1970, plaintiff received $4.00 per month in her ANFC grant to cover the cost of fire insurance.

13. Prior to November 1, 1970, fire insurance was a separate special need item in Vermont's ANFC program. Under this policy, the state would reimburse an ANFC recipient for the full cost of fire insurance on a monthly basis without regard to whether the recipient was receiving the maximum payment under the shelter or basic needs components of the ANFC program.

14. Prior to November 1, 1970, 388 or approximately 10 per cent of the ANFC caseload received reimbursements for fire insurance.

15. On November 1, 1970, pursuant to new regulations issued by the Department of Social Welfare, separate special exceptions for fire insurance were eliminated. Under the new program, fire insurance was an item placed within the shelter component of the basic need standard. However, fire insurance payments were only allowed if the recipient's shelter allotment was not up to the applicable maximum and then only to the extent that the combined cost of shelter and fire insurance did not exceed the shelter maximum. If an ANFC recipient was already receiving the maximum allotment solely for shelter, no reimbursement for the cost of fire insurance was permitted.

16. Despite the inclusion of a new item into the shelter component, the shelter maxima were not upwardly adjusted to reflect the cost of this item.

17. In the plaintiff's case, her shelter allotment was already at the applicable maximum of $104.00 and thus, under the November 1, 1970, regulations she was entitled to no further payments for fire insurance.

18. Subsequent to November 1, 1970, but prior to August 1, 1971, the Department of Social Welfare averaged the cost per ANFC recipient of certain special exceptions eliminated on November 1, 1970. Fire insurance was among the items enumerated in this averaging process.

19. The average per recipient cost of the items

eliminated from the basic need standard was $2.18 which the Department of Social Welfare rounded to $2.00.

20. The averaging of the fire insurance cost over the entire ANFC caseload resulted in a cost figure of $ .16 cents per recipient.

21. The averaging of the cost of fire insurance over the entire ANFC caseload did not result in any increase in the basic need standard.

22. Although fire insurance was an item placed under the shelter component of the basic needs standard, the other items whose costs were averaged throughout the total ANFC population were totally eliminated as identifiable items in the basic need standard.

IV. Opinion and Conclusions of Law

A. The Propriety of the Elimination of the Shelter Grant Exceptions

In his October 14, 1972 decision, Judge Oakes concluded that the defendant's November 1, 1970 elimination of shelter exceptions was, in effect, a downward adjustment of the overall standard of need inimical to section 402(a)(23) as interpreted in Rosado v. Wyman, 397 U.S. 397 (1970). Judge Oakes' decision, however, recognized the qualification in Rosado that section 402(a)(23) proscribed only a significant reduction in the standard of need. 397 U.S. at 417-18. Thus, the initial issue before us is whether the shelter exception program eliminated by the Department of Social Welfare on November 1, 1970 was a significant or insignifi-

oant part of Vermont's ANFC program. If it was insignificant, then its elimination is not barred by section 402(a)(23). Rosado v. Wyman, supra at 417-18.

Our threshold task in assessing the significance or insignificance of the elimination of shelter exceptions is to adopt a yardstick for gauging the impact of their deletion. In this regard Rosado provides some meaningful instruction. In assessing whether certain deletions effected by the State of New York from its standard of need were significant, the Court in Rosado focused upon whether the discontinued payments were "regular recurring expenses to a significant number" of welfare recipients. 397 U.S. at 418. See also Johnson v. White, 353 F. Supp. 69 (D.Conn. 1972). Thus, dollars spent, dollars saved and the amount received per recipient do not appear to have paramount importance in determining significance. Rather, the Court in Rosado appears to have looked to the magnitude of the impact on the ANFC populace itself.[5/] Thus, for purposes of our analysis, we shall look to the number of recipients affected by the abandonment of the shelter exception program.

A second question implicit in the determination of significance is whether the number of recipients affected by the elimination of shelter exceptions should be considered on a state-wide basis or should be limited to the members of plaintiff's class, which is composed of certain ANFC recipients in Chittenden County. Although the impact of the November 1, 1970 deletion of shelter exceptions was most pronounced in Chittenden County, we cannot ignore the

facts that the elimination of the exceptions did have a state-wide impact and the new program implemented on November 1, 1970 was not limited solely to Chittenden County. Furthermore, Judge Oakes' opinion emphasized that the applicable test was whether the shelter exceptions were an integral or significant part of the "overall ANFC Program." See opinion of October 14, 1972 at 17, 20. We believe that standard is controlling and consequently we shall measure significance on a state-wide basis.

This conclusion gives rise to the final parameter for comparison. Simply stated, do we compare the number of cases receiving shelter grant exceptions to the entire ANFC caseload or should the comparison be limited to the number of cases receiving shelter grant exceptions as a proportion of ANFC recipients whose payments included shelter grants? It would seem that Judge Oakes' instruction that the number of shelter grant exceptions should be compared to the overall ANFC program governs us in this regard also. Moreover, the shelter grant exception was but one component in the composition of the overall standard of need under the ANFC program as it existed prior to November 1, 1970. Furthermore, to limit the comparison statistic to only those receiving ANFC shelter grants (thus necessarily increasing the significance of the deletion of the shelter exceptions) would penalize the State for a failure to face up to the extent to which its shelter component fell short of actual need before

that recognition became mandatory under section 402(a)(23). See Rosado v. Wyman, supra at 412-13. In sum, we conclude that the relevant methodology in this case is to compare the number of cases receiving shelter exceptions with the entire ANFC caseload.

It appears that of the 3,763 cases under the ANFC program in October of 1970, 159 or 4.2 per cent of the cases received shelter exceptions. We believe this figure is sufficiently insignificant or de minimis so as to be outside the operative scope of section 402(a)(23) as construed in Rosado. See e.g. Johnson v. White, supra at 77 (2 per cent deviation held de minimis). Even if we were to compare the 159 shelter grant exception cases with the number of cases receiving shelter grants during that period (3,166), only 5 per cent of that limited group was affected by the deletion of shelter exceptions which we believe is similarly insignificant.

Although not strictly in line with the focus in Rosado, it is conceivable that a special need such a shelter grant exceptions, while not affecting a significant number of ANFC recipients, could be such an integral part of a state's ANFC program that it should be viewed as significant for purposes of elimination in a re-evaluation of the standard of need. In the case before us, the dollar amount expended for shelter grant exceptions during 1970 was approximately .5 per cent (.005) of the total dollar amount spent in the ANFC program. A comparison of the shelter grant exceptions to the total amount spent

for shelter in the ANFC program in 1970 reveals that the former is 1 1/2 per cent of the latter. Under either comparison, we do not believe that the elimination of the shelter grant exception was significant.

In light of the above, we conclude that the shelter exception practice deleted in November of 1970 was not a significant part of Vermont's ANFC program and thus we enter judgment for defendant on this point.

B. Whether the Elimination of Fire Insurance as a Separate Need Item Violated Section 402(a)(23).

The essence of the controversy over fire insurance revolves around the defendant's deletion of this item as a separate special need item with an unlimited maximum when the new ANFC regulations were promulgated on November 1, 1970. Under Rosado, if a special need item is eliminated as a cognizable component of the standard of need, its cost must be accounted for and fairly priced into the basic need standard so as not to negatively adjust the content of the standard of need.[6/] Furthermore, the pricing of an item so eliminated must be spread throughout the ANFC caseload or in some other equitable manner distributed to the recipients. Defendant contends that this was done with respect to fire insurance in this case.

We cannot agree that the treatment of fire insurance under the Department's November 1, 1970 regulations did not violate section 402(a)(23).

It is apparent that despite defendant's contention

that the cost of fire insurance was priced into the basic needs standard and distributed throughout the caseload, no ANFC recipient received any direct benefit from this costing because of the defendant's policy of rounding benefits to the nearest dollar. Thus, the 16 cent per recipient figure allocated for fire insurance was in effect averaged out of the standard of need.[7/] As Judge Oakes has already ruled, the fact that the savings realized thereby may have been used to increase the level of benefits under a ratable reduction plan has no relevance to the propriety of eliminating such items from the standard of need. Plaintiff has not challenged the policy of rounding the standard of need to the nearest whole dollar and we do not pass on its propriety here but the fact that the rounding process effectively removed fire insurance from the standard of need under defendant's interpretation of what became of fire insurance prompts us to consider more stringently how fire insurance was in fact treated under the new regulatory scheme. A primary purpose of section 402(a)(23) is to radically circumscribe a state's ability to obscure the actual standard of need through statistical obfuscation. See Rosado v. Wyman, supra at 413.

It is clear from defendant's written regulations that fire insurance was placed within the shelter component maxima on November 1, 1970. Consequently, the regulatory program effective November 1, 1970 should be construed

not as an elimination of the fire insurance component but as a reduction in the amount payable thereunder, i.e. the establishment of a maxima on fire insurance where none existed before. Since fire insurance was not in fact eliminated as a discernible item from the basic need standard, it was improper to place it in the list of needs wholly eliminated for purposes of distributing its price throughout the ANFC caseload. Furthermore, to the extent this item was placed in the list of eliminated needs, it constituted a duplication in the basic need standard since it was already an enumerated component in the written regulations governing shelter grants. Duplications in components of the basic need standard must be eliminated. Rosado v. Wyman, 322 F. Supp. 1173, 1185-86 (S.D.N.Y. 1970), aff'd, 437 F.2d 619 (2d Cir. 1970). Moreover, since the written regulation placing fire insurance within the shelter maxima was promulgated prior to the averaging and distribution throughout the caseload of eliminated needs, it takes precedence over the averaging process and demonstrates the true status of fire insurance after November 1, 1970. In view of these factors, we conclude that fire insurance was not in fact eliminated as a discernible need item under the new regulations; it was removed from its prior status as an independent need item and placed within the maxima applicable to the shelter component of the basic need standard.

It is significant that prior to November 1, 1970 reimbursement grants for fire insurance were not subject to limitation. Section 402(a)(23) requires in part that by July 1, 1969 any maximums that the state imposes on the amount of aid paid to families will have been proportionately adjusted to reflect appropriate cost of living increases. The imposition of maximums which reduce the overall level of benefits does not comport with that mandate. One of the major purposes of section 402(a)(23) was to give states an incentive to abandon a flat maximum system in favor of a ratable reduction system. Rosado v. Wyman, supra at 413-14. By placing fire insurance within the shelter maxima where prior to November 1, 1970 no limit had been placed upon this special need item, the state accomplished just the reverse of what is required by section 402(a)(23). It follows therefrom that plaintiff is entitled to judgment on this point. This opinion shall constitute our findings of fact and conclusions of law under Rule 52(a), Fed. R. Civ. P.

V. Relief to be Granted.

Although plaintiff's complaint seeks "an order requiring defendant to pay plaintiffs the welfare benefits they have been deprived of" by the defendant's regulations which violate section 402(a)(23), Edelman v. Jordan, ___ U.S. ___, 42 U.S.L.W. 4419 (March 25, 1974) holds that retroactive payment of benefits is

prohibited in cases such as the one before us. See also Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972).

The Court is of the opinion that insofar as prospective fire insurance payments are concerned injunctive relief is proper. However, we perceive that various options are available to the defendant to harmonize its fire insurance program with the provisions of federal law. Therefore, within thirty days from the date of this opinion, defendant is directed to submit a plan to this Court whereby fire insurance payments may be made in a manner consistent with section 402(a)(23). A copy of said plan shall be submitted to plaintiff, who shall have fifteen days from receipt thereof to present to the Court any objections which she may have thereto.

Dated at Burlington in the District of Vermont, this 9th day of May, 1974.

/s/ Albert W. Coffrin
District Judge

FOOTNOTES

1/ A shelter exception is an exception to the shelter maxima component in the basic need standard whereby an ANFC recipient could receive the full amount of shelter costs in his or her ANFC grant even though shelter costs exceeded the maximum amount for shelter set by the Department of Social Welfare.

2/ A case is comprised on the average of approximately 3.6 ANFC recipients. See defendant's exhibit "C".

3/ There was evidence that in September of 1970 the state wide ANFC caseload was 3742 cases. See defendant's exhibit "C". However, defendant's exhibit "E" indicates that in October of 1970 the state-wide ANFC caseload had risen to 3,763. Although the difference is minor, we believe the caseload immediately prior to the November 1, 1970 promulgation of new ANFC regulations is the more relevant statistic.

4/ No evidence was introduced concerning the total number of ANFC cases in Chittenden County prior to November 1, 1970.

5/ The relevant time frame for determining the number of recipients affected would seem to be, as the parties accepted by their evidentiary proofs, a reasonable period prior to the challenged alteration in the standard of need.

6/ Since approximately 388 cases or 10 per cent of the ANFC caseload of 3763 cases in October, 1970 received special needs reimbursements for fire insurance, we consider its elimination as a separate factor in the basic need standard significant within the meaning of Rosado v. Wyman.

7/ In this regard we note that the evidence is inconsistent with any contention that the per item average of the eliminated needs was reduced pro rata to yield the rounded figure of $2.00 per recipient.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Therese Roberge, on behalf of herself, her minor children and all persons similarly situated	Civil Action
vs.	No. 6301
Paul Philbrook, Commissioner of Social Welfare	

ORDER OF JUDGMENT

Upon the basis of the evidence, the arguments of counsel, the opinions of the Court dated October 14, 1972 and May 9, 1974, and correspondence from defendant's counsel dated June 6, 1974 and plaintiff's counsel dated June 10, 1974, it is ORDERED, ADJUDGED AND DECREED that:

1. Defendant, his employers, agents, successors and assigns, within thirty days from the date hereof, shall restore fire insurance costs as an independent need item within the Aid to Needy Families with Children Program and shall pay to each recipient family within the program the full amount of their fire insurance costs irrespective of whether their shelter costs equal or exceed the shelter maxima.

2. Defendant is enjoined from modifying or implementing any proposal with respect to the amount or condition of payment of fire insurance costs in the Aid to Needy Families with Children Program different than those set forth above unless defendant shall submit to the Court and to the plaintiff any plan for such modification or implementation thirty days prior

to its effective date and approval for such modification or implementation has been granted by the Court.

Dated at Burlington in the District of Vermont, this 19th day of February, 1974.

/s/ Albert W. Coffrin
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, On behalf of herself, her minor children and all persons similarly situated, Plaintiff	)	CIVIL ACTION NO. 6301
vs.	)	
PAUL PHILBROOK, Commissioner of Social Welfare, Defendant	)	

NOTICE OF APPEAL

Notice is hereby given that Therese Roberge and all persons similarly situated, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of the Court of October 14, 1972, granting defendant's motion for summary judgment, in part; and from the Order of the Court of May 9, 1974 entering judgment for defendant, in part.

DATED at Burlington, Vermont, this 19th day of August, 1974.

/s/ John A. Dooley, III
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
P. O. Box 562
Burlington, Vermont 05401
COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing NOTICE OF APPEAL upon David Kalib, Esq., Assistant Attorney General, Department of Social Welfare, Montpelier, Vermont 05602, by first class mail, this 19th day of August, 1974.

/s/ John A. Dooley, III
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

THERESE ROBERGE, On behalf of herself, her minor children and all persons similarly situated, Plaintiff	)	CIVIL ACTION NO. 6301
vs.	)	
PAUL PHILBROOK, Commissioner of Social Welfare, Defendant	)	

NOTICE OF APPEAL

Notice is hereby given that Paul Philbrook, Defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of Judgment entered in this action on the Nineteenth day of July, 1974.

DATED at Montpelier, Vermont, this 23rd day of August, 1974.

/s/ David L. Kalib
DAVID L. KALIB
Assistant Attorney General
Office of Attorney General
Montpelier, Vermont 05602
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing NOTICE OF APPEAL upon John A. Dooley, III, Esq., Vermont Legal Aid, Inc., P. O. Box 562,

Burlington, Vermont 05401, by first class mail,

this 23rd day of August, 1974.

/s/ David L. Kalib
DAVID L. KALIB
Assistant Attorney General